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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

IN RE MOSES N. ASLAN,
Debtor.

THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK,
Cross-Petitioners,

v.

MOSES N. ASLAN,
Cross-Respondent.

BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Cross-Respondent set forth a clear and concise statement of the facts upon which the Petition for Writ of Certiorari (the "Petition") is based in the Petition. The Cross-Petitioners greatly elaborated on these facts in their Brief for Respondents in Opposition (the "Brief in Opposition"). This expanded statement of the facts was referenced in their Cross-Petition for Writ of Certiorari (the "Cross-Petition") along with their version of the facts upon which the Cross-Petition rests.[1]

The Cross-Respondent submits that the additional "facts" asserted by the Cross-Petitioners contain numerous allegations made by various persons in declarations filed in support of a number of pleadings in the courts below, that these allegations were and are disputed by the Cross-Respondent, and that most if not all of these allegations cannot be considered "facts" for the purposes of this appeal. The Cross-Petitioners' statement of the facts goes far beyond a clear and concise statement of the undisputed facts and contains numerous misstatements.

To remedy this, the Cross-Respondent will recite herein the undisputed material facts upon which the Petition and Cross-Petition are based, and then point out the misstatements in the Cross-Petitioners' Brief in Opposition and Cross-Petition.

A. Statement of the Facts Material to the Petition.

The Cross-Petitioners are the holders of a disputed claim against the bankruptcy estate of Moses N. Aslan who is the Cross-Respondent herein and the debtor in a Chapter

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[1]The Hongkong and Shanghai and Central Banks shall be referred to as "Cross-Petitioners" and Moses N. Aslan shall be referred to as "Cross-Respondent" herein.

11 case currently pending in the Central District of California. The claim arose when the Cross-Petitioners filed a lawsuit against Aslan and others alleging in part that Aslan was involved in a check kiting scheme and alleging actual damages in the amount of $3,151,158.22 plus interest, punitive damages, treble damages under RICO and other relief. The Third Amended Complaint was filed in December 1983.

At the time, the Cross-Respondent owned several parcels of real estate in the City of Los Angeles. Claiming entitlement to a constructive trust, the Cross-Petitioners recorded lis pendens upon all of these parcels, making it virtually impossible for the Cross-Respondent to remedy his financial affairs without first satisfying the Cross-Petitioners. With respect to one of these parcels, known as the Rowan Building, the Cross-Petitioners also held a deed of trust and commenced foreclosure proceedings in December 1984.

The lawsuit was eventually settled on or about March 25, 1985, the date set for the foreclosure of the Rowan Building, by an agreement that was subsequently memorialized in the Stipulated Judgment. The Stipulated Judgment provided for entry of a judgment against the Cross-Respondent and in favor of the Cross-Petitioners in the amount of $8,373,298.56, plus interest, or alternatively for conveyance of legal title of the parcels of real estate to the Cross-Petitioners, and for reduction of the judgment to $6,373,298.56 upon timely payment of that amount in installments due on July 1, 1985, September 30, 1985, December 31, 1985, and June 30, 1986, among other provisions.

Subsequently, the characterization of the $2 million difference between the $8,373,298.56 judgment sum and the $6,373,298.56 reduced judgment sum has been the subject of much dispute between the Cross-Respondent and the Cross-Petitioners. The Cross-Respondent has contended

that this $2 million constitutes an illegal penalty and as such should not be allowed as part of the Cross-Petitioners' bankruptcy claim. This argument was first made in the Cross-Respondent's objection to the Cross-Petitioners' Amended Proof of Claim, which was filed on or about July 28, 1986 in the amount of $9,401,032.96. No evidentiary hearing on this issue has ever been held in the bankruptcy court.

B. Statement of the Facts Material to the Cross-Petition.

On or about June 11, 1985, after postponing the foreclosure sale on the Rowan Building for some time, the Cross-Petitioners finally held their foreclosure sale. The Cross-Petitioners were the successful bidders, credit bidding the amount of $1,694,010.66, the amount due under the note secured by the lien on the Rowan Building. In July 1985, the Cross-Petitioners sold the Rowan Building to the Rowan Development Corporation for $5,000,000.00.

Shortly thereafter, on August 1, 1985, the Cross-Respondent and the Cross-Petitioners entered into the Letter Agreement, pursuant to which the Cross-Petitioners agreed to, and did, credit the net proceeds of the Rowan Building resale to the full and complete payment of the July 1, 1985, and September 30, 1985, installment payments referenced in the Stipulated Judgment. The Letter Agreement also contained provisions requiring Aslan to ratify, affirm and approve all of the provisions of the Stipulated Judgment.

The Cross-Petitioners contend that the Letter Agreement required the Cross-Respondent to forbear from attacking the Stipulated Judgment in order to receive the benefits of the credit of the Rowan Building resale. The Cross-Respondent disputes this position. The Bankruptcy Court ruled that Aslan was entitled to the credit provided in the Letter Agreement. This ruling was affirmed by the District Court and by the Ninth Circuit Court of Appeals.

C. Misstatements of Fact in the Brief in Opposition and Cross-Petition.

The Cross-Petitioners have repeatedly included "facts" in briefs submitted below and in this Court that are based on inadmissible hearsay contained in declarations filed in support of various pleadings submitted to the courts below. These so-called facts must be disregarded by this Court in considering the Petition and Cross-Petition.

First, the Cross-Petitioners assert that the Cross-Respondent admitted he engaged in a check kiting scheme. This is a distortion of the record. The Cross-Petitioners cite to the declarations of Charles Levy and Douglas Wiita, both of whom are or were counsel for the Cross-Petitioners, respecting statements they purportedly heard the Cross-Respondent make. Not only are these statements hearsay, but neither declarant has ever been subjected to cross-examination with respect to their declarations.

The Cross-Petitioners also seem to find it significant that the Cross-Respondent did not specifically object to the check kiting assertion in the Amended Proof of Claim filed by the Cross-Petitioners nor object when the Cross-Petitioners' counsel repeated the allegation in oral argument on the issue of whether the Cross-Respondent could be in default of his obligation to make the fourth payment after the filing of the bankruptcy case. Failure to object in these circumstances, however, does not lead to the conclusion that the Cross-Respondent admitted he had engaged in check kiting. The Cross-Respondent urges the Court to note that neither the Stipulated Judgment, the Letter Agreement nor the Bankruptcy Court's Findings of Fact contain any admission or finding that the Cross-Respondent engaged in the alleged check kiting scheme. The fact is that the Cross-Respondent has consistently denied such allegation.

Second, the Cross-Petitioners allege that the Cross-Respondent has misstated the facts by stating that the

lawsuit was based on a claim of actual damages in the amount of $3,151,158.22 plus interest. Although the Cross-Respondent concedes that the Cross-Petitioners also sued for punitive damages and other relief under other counts, the fact remains that the Cross-Petitioners claimed that the amount of the alleged check kite was approximately $3.1 million.

Further, in the Brief in Opposition, the Cross-Petitioners claim that the Cross-Respondent admitted using funds from the alleged check kiting scheme to meet his real property obligations. As support for these "facts," the Cross-Petitioners again cite to inadmissible hearsay statements of its own counsel. The Cross-Petitioners also cite the Disclosure Statement prepared by the Chapter 11 Trustee in support of the Trustee's Plan; however, nothing in the pages cited of the Disclosure Statement has anything to do with the alleged admission.

Next, the Cross-Petitioners claim that the original settlement discussions provided for a stipulated judgment in the amount of $10 million. Again this "fact" is supported only by the inadmissible hearsay contained in a declaration of the Cross-Petitioners' own counsel.

The statement of facts contained in the Brief in Opposition, pp. 4-5, contains a long recitation of the alleged conversations between counsel for the Cross-Petitioners and counsel for the Cross-Respondent regarding the Cross-Petitioners' fears that the Cross-Respondent would breach the agreement, the reasons for the Cross-Petitioners continuation of the foreclosure sale of the Rowan Building and a history of the negotiations that led to the entry of the Stipulated Judgment. The only source for any of these alleged "facts" is, once again, the inadmissible hearsay in the declaration of counsel for the Cross-Petitioners.

The Cross-Petitioners frequently point to the fact that the Cross-Respondent testified at the hearing on the entry of the Stipulated Judgment that he was not threatened or

under any duress to enter into the Stipulated Judgment. The "hearing" however consisted only of a presentation of the Stipulated Judgment to the Superior Court Judge and the examination of Mr. Aslan by counsel for the Cross-Petitioners. The reality is that the Cross-Petitioners would not have entered into the Stipulated Judgment had Mr. Aslan testified that he was entering it under duress. His testimony in such circumstances cannot be held to reflect his true state of mind when entering into the Stipulated Judgment. In fact, the Cross-Respondent has consistently argued that he was under extreme financial pressure to resolve his disputes with the Banks as a result of their filing of lis pendens against all of his real estate holdings and the pending foreclosure of the Rowan Building.

Next, the Brief in Opposition recites as "fact" alleged conversations between the Cross-Respondent and his former counsel, Charles Rose, regarding Rose's interpretation of the Letter Agreement as providing for a forfeit of the Rowan Building proceeds if the Cross-Respondent attacked the Stipulated Judgment. This inadmissible hearsay and privileged information is derived from a declaration signed by Rose in support of the Cross-Petitioners' filings below after the Cross-Respondent brought a malpractice lawsuit against Rose. Once again, this kind of statement is not a "fact," but merely an allegation made by the Cross-Petitioners that is disputed by the Cross-Respondent.

The Cross-Petitioners contend that the Cross-Respondent's statement regarding the reason the Amana Corporation's offer to purchase the Stipulated Judgment was not consummated is incorrect. Although the reason for the failure of the parties to reach an agreement is not essential or relevant to the present question, the Cross-Respondent points out, once again, that the only support for the Cross-Petitioners' assertion is the declaration of its own counsel—inadmissible hearsay.

In conclusion, the Cross-Respondent and the Cross-

Petitioners have a marked disagreement about the circumstances which led to the Cross-Petitioners' claim in the Cross-Respondent's bankruptcy case. What is not at issue is that the claim is based on the provisions of the Stipulated Judgment and the Letter Agreement. The question before the bankruptcy court was, in essence, whether and in what amount should the Cross-Petitioners' claim be allowed.

D. Procedural Background.

The procedural background of the case has been thoroughly covered in both the Petition, the Brief in Opposition and the Cross-Petition. The Cross-Respondent accepts the correction made in the Brief in Opposition regarding whether the Cross-Petitioner requested a rehearing on the May 29, 1992, opinion issued by the Ninth Circuit Court of Appeals. The record indicates that the Cross-Petitioners did not request a rehearing en banc as was erroneously stated in the Petition.

ARGUMENT

A. Summary of Argument.

Due process requires that no person may be deprived of a property interest without notice and an opportunity for a meaningful hearing. The three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976) must be weighed and balanced to identify the kind of notice and type of hearing dictated by the due process clause.

The Cross-Petitioners arguably have no property interest at all in the Rowan Building proceeds, but assuming that they do, they have already had the opportunity for a judicial hearing on the merits of each argument raised in the Cross-Petition. There is no reason to reconsider the setoff issue underlying the Cross-Petition in the event the Petition is granted.

B. The Cross-Petitioners Have Received Due Process of Law.

The due process clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V.[2] Procedural due process requires at a minimum

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[2]The Cross-Respondent can find no authority for the basic premise upon which the Cross-Petition relies; that the Cross-Petitioners, banking corporations which are wholly-owned subsidiaries of foreign corporations, and "persons" within the meaning of the Fifth Amendment. The Petitioner concedes that "[i]t is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment," *Metropolitan Life Incs. Co. v. Ward*, 470 U.S. 869, 881 n. 9, 105 S.Ct. 1676, 1683 n. 9, 84 L.Ed.2d 751 (1985), and that alien individuals are protected by the due process clause of the Fifth Amendment, *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed. 2d 478 (1976). Chief Justice Rehnquist propounded the rationale for extending the Fourteenth Amendment's protection to a corporation's property rights in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 823-24, 98 S.Ct. 1407, 55 L.Ed. 2d 707 (1978) (Rehnquist, J. dissenting). Since the states character corporations and allow them to acquire and utilize property under state law, it follows that the states may not deprive a corporation of that property without due process of law. *Id.* "The word 'person,' however, is not a term of art with a fixed meaning whenever it is used." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 316, 98 S.Ct. 584, 589, 54 L.Ed. 2d 563 (1978). To interpret the meaning of the work "person" in a statute, this Court has first examined the statute's language and purpose and, if no clue to its

that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *State v. Central State Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The opportunity for hearing "must be granted at a meaningful time and in a meaningful manner." *State v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965).

The Cross-Petition does not discuss the notice requirement, but appears to focus on whether the Cross-Petitioners

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meaning is discovered there, has sought the "indicia of congressional intent at the time the statute was enacted." *Ngiraingas v. Sanchez*, 495 U.S. 182, _____, 110 S.Ct. 1737, 1740, 109 L.Ed. 2d 163 (1990). Applying that method to the Bill of Rights, one notes that a corporation has no "life or liberty" interests, the two other interests protected by the due process clause. Thus the language of the Fifth Amendment does not appear on its fact to include corporate entities. The intent of the framers must be considered next. The Fifth Amendment is directed primarily to the protection of individuals and personal rights, *U.S. v. White*, 322 U.S. 694, 698, 64 S.Ct. 1248, 88 L.Ed. 2d 1542 (1944), and that is what was intended at the time the Fifth Amendment was ratified. If the Respondents are not among the "persons" protected by the due process clause of the Fifth Amendment, then they lack standing to bring the Cross-Petition and it should be denied on those grounds. *See, e.g., State of Alabama v. U.S. E.P.A.*, 871 F.2d 1548, 1554 (11th Cir. 1989), *cert. denied*, 493 U.S. 991, 110 S.Ct. 538, 107 L.E. 2d 535 (1989) (state was not among entities protected by due process clause of Fifth Amendment and lacks standing to claim that E.P.A. was compelled to provide it with notice and opportunity to be heard).

received an opportunity for hearing, and whether the opportunity for hearing was granted at a meaningful time and in a meaningful manner. Thus, the Cross-Petition asserts that the Cross-Petitioners are entitled to an evidentiary hearing on the issue of whether the Rowan Building resale proceeds should have been credited against the Cross-Petitioners' claim in the Cross-Respondent's bankruptcy case. The Cross-Petitioners argue that due process requires that they be afforded an evidentiary hearing in the event the Petition is granted and this Court either finds for the Cross-Respondent on the merits or remands the Cross-Respondent's case to the bankruptcy court for a factual determination of the penalty issue.

1. Identification of the Specific Dictates of Due Process Requires a Consideration of the Three Factors Enunciated in *Mathews*.

This Court has identified three distinct factors which must be considered in identifying the specific dictates of due process in any given scenario. Those factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed. 2d 18 (1976). These factors must be weighed and balanced to determine the kind of notice and type of hearing required to meet the mandate of the due process clause. *See, e.g., Orloff v. Cleland*, 708 F.2d 372 (9th Cir. 1983).

2. Application of the *Mathews* Test to the Case at Bar Shows That the Cross-Petitioners Have Received Due Process of Law.

The first factor to be considered under the three-part test set forth in *Mathews* is the private interest that will be affected by official action. Here, the very heart of the dispute is whether the Cross-Petitioners have any property interest in the proceeds from the resale of the Rowan Building. The $3.1 million credit has been remitted to the Cross-Respondent under the terms of the Stipulated Judgment and the Letter Agreement. The Cross-Petitioners claim that they should be excused from honoring this provision of the agreement, even though they have received the full amount of the Stipulated Judgment. The Cross-Respondent argues that the Cross-Petitioners have no property interest in the disputed sum, and thus no property interest to be protected under the due process clause.

The second factor to be considered is whether there is a risk of erroneous deprivation of any property interest through the procedure used. The risk appears to be quite small. Not only has the issue been extensively litigated in the bankruptcy court and the appellate courts with findings in favor of the Cross-Respondent at all levels, but the Cross-Respondent asserts that the disputed sum is not the property of the Cross-Petitioners.

The Cross-Petitioners appear to rely on two possible arguments to support their position that the Rowan Building proceeds should not have been credited against the claim. First, they argue that the Letter Agreement contained an implied covenant not to attack the Stipulated Judgment. This argument was considered by the Ninth Circuit Court of Appeals and rejected. The Ninth Circuit held that good faith lawsuits were always allowed and further found that any covenant not to sue would have applied to the merits of the original suit, not to the merits of the settlement of that

suit. *See* Pet., App. B-7, *citing Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Dist. Corp.*, 358 F.2d 432 (2d Cir. 1966).

Second, the Cross-Petitioners claim they were excused from their performance under the contract when the Cross-Respondent breached the Letter Agreement and/or the Stipulated Judgment. Once again, this issue was considered by the Ninth Circuit Court and found to be without merit. Pet., App. B-7. The Cross-Petitioners have been paid the full amount owed to them under the agreement, thereby receiving the full benefit of the bargain.

If the Cross-Respondent is successful in having the claim reduced by the amount of the $2 million penalty, the Cross-Petitioners argue that this successful attack on the Stipulated Judgment would constitute a breach and thus vitiate their performance. This argument ignores the fact that the Cross-Respondent has *already* attacked the Stipulated Judgment, regardless of whether that attack is ultimately successful. This fact existed at every stage of the proceedings below and none of the lower courts found that it constituted a breach of the agreement. There is no need to consider the same argument again.

Due process requires,

> at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.
>
> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. . . . What the Constitution does require is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner," [citing *State v. Manzo*, 380 U.S. at 552 (emphasis added)], "for [a] hearing appropriate to the nature of the case,"

> [citing *State v. Central State Bank & Trust Co.*, 339 U.S. at 313]. The formality and procedural requirements for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. [Footnote omitted.]

Boddie v. Connecticut, 401 U.S. 371, 377-78, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971).

Where this Court has established a due process right to an evidentiary hearing, the person at risk of being deprived of a property interest has had a far more important interest to protect than the alleged property interest of the Cross-Petitioners. For example, welfare recipients were held to be entitled to an evidentiary hearing prior to the termination of their benefits in *Goldberg v. Kelly*, 397 U.S. 254, 266-71, 90 S.Ct. 1011, 1019-22, 25 L.Ed. 2d 287 (1970), and suits for pre-judgment replevin of property were held to require more than a mere ex parte proceeding before a court clerk in *Fuentes v. Shevin*, 407 U.S. 67, 96-97, 92 S.Ct. 1983, 2002-03, 32 L.Ed. 2d 556 (1972).

In the case at bar, the Cross-Petitioners have already been granted a hearing on each argument they now raise. The Cross-Respondent contends that none of the Cross-Petitioners' arguments require any additional factual determination to be resolved. An evidentiary hearing is not necessary to decide the issues of law raised by the Cross-Petitioners.

The third factor that must be considered under the *Mathews* test is the government's interest. The government's interest here is in the prompt resolution of disputes in the courts and in judicial economy. This interest in bringing final resolution of the issues is significant and outweighs the minimal risk to the Cross-Petitioners that they will be deprived of a property interest without due process of law.

C. The Issue Raised in the Petition Is Not Tied to the Issue Raised in the Cross-Petition.

The Petition seeks a writ of certiorari to the Ninth Circuit Court of Appeals because the Cross-Respondent was never granted an opportunity to be heard regarding whether the Cross-Petitioners' claim included an invalid penalty. The Cross-Respondent has argued that the bankruptcy court misapplied the doctrine of res judicata in the context of the claims allowance process.

The Cross-Petition seeks a writ of certiorari only in the event the Cross-Respondent is successful on the merits. The Cross-Petitioners claim that if the penalty portion of the claim is held to be invalid, then that would entitle them to a reconsideration of the merits of their contract interpretation argument.

The only relationship between the Petition and the Cross-Petition is that both arise out of the same set of circumstances and both involve a dispute over the allowed amount of the claim. The claims allowance process requires the bankruptcy court to consider whether a claim should be allowed against the estate and, if so, in what amount it should be allowed. Both the Petition and the Cross-Petition deal with the amount question. Other than this surface similarity, however, there is no relationship between the two. The Cross-Respondent's penalty issue does not require any new consideration of the setoff of the Rowan Building proceeds.

Even if the Cross-Petitioners' claim is ultimately lowered in the amount of the illegal penalty, there is nothing in the Stipulated Judgment or Letter Agreement which would indicate that the Rowan Building proceeds should not be credited. The documents on their face provide that the proceeds will be credited to the Cross-Respondent when the Stipulated Judgment amount is paid in full. The courts below have unanimously agreed that the

contract has been correctly interpreted, that the Cross-Respondent has performed, and that the $3.1 credit was properly applied.

D. The Cross-Petitioners' Reliance on Supreme Court Rule 10.1(a) Is Misplaced.

The Cross-Petitioners rely on Supreme Court Rule 10.1(a) as their reason for this Court to grant the Cross-Petition. Rule 10.1(a), however, states that "[w]hen a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision," then this Court will consider granting a petition for a writ of certiorari. S.Ct.R. 10.1(a). The Cross-Petitioners do not point to any departure from the accepted course of judicial proceedings by the Ninth Circuit Court of Appeals or any lower court. Instead, the Cross-Petitioners seem to argue that *this* Court will have departed from the accepted and usual course of judicial proceedings if it fails to grant the Cross-Petition under certain conditions. This cannot be a reason for granting a writ of certiorari to the Ninth Circuit Court of Appeals.

CONCLUSION

The Cross-Petition for Writ of Certiorari should be denied, regardless of the disposition of the Petition. The Cross-Petitioners have not been deprived of due process of law under the Fifth Amendment. They have no property interest to be protected, but assuming they have a colorable claim to the Rowan Building proceeds, they have already been granted notice and a meaningful hearing in the lower court on each and every argument made in the Cross-Petition.

Respectfully submitted,

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